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No. 93-1180

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

AUTO CLUB INSURANCE ASSOCIATION,
Petitioner,
v.
PENTWATER WIRE PRODUCTS, INC.,
Respondent.

AUTO CLUB INSURANCE ASSOCIATION,
Petitioner,
v.
FREDERICK & HERRUD, INC.,
Respondent.

BRIEF IN OPPOSITION
ON BEHALF OF FREDERICK & HERRUD, INC.
(now known as Thorn Apple Valley, Inc.)

AND APPENDIX

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER FEDERAL COMMON LAW UNDER ERISA ALLOWS A STATE COURT TO CREATE A REMEDY IN FAVOR OF A NO-FAULT AUTO INSURANCE CARRIER AGAINST AN EMPLOYER-SPONSOR OF AN ERISA WELFARE BENEFIT PLAN DESPITE THE FAILURE OF CONGRESS TO PROVIDE SUCH A REMEDY IN SECTION 502 OF ERISA.

II.

WHETHER FEDERAL COMMON LAW UNDER ERISA ALLOWS A NO-FAULT AUTO INSURANCE CARRIER TO BRING A SUBROGATION ACTION IN STATE COURT AGAINST THE EMPLOYER-SPONSOR OF AN ERISA WELFARE BENEFIT PLAN.

III.

WHETHER, ASSUMING A CAUSE OF ACTION AND REMEDIAL AUTHORITY EXIST, FEDERAL COMMON LAW UNDER ERISA REQUIRES THAT A DISPUTE OVER COVERAGE BETWEEN AN ERISA WELFARE BENEFIT PLAN AND A NO-FAULT AUTO INSURANCE POLICY, BOTH CONTAINING COORDINATION OF BENEFITS PROVISIONS, MUST BE RESOLVED IN FAVOR OF THE AUTO INSURANCE CARRIER.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are listed in the caption. Respondents are not, however, "self-insured welfare benefit plans," as asserted by Petitioner. Rather, they are corporations which have sponsored self-insured welfare benefit plans for their employees.

Respondent Frederick & Herrud, Inc., has been known as Thorn Apple Valley, Inc., for many years. This fact was reflected in the case caption when this matter was previously before the Court during the 1989 Term. *Thorn Apple Valley, Inc.* v. *Auto Club Insurance Association*, 489 U.S. 996 (1990). Neither Frederick & Herrud, Inc., nor Thorn Apple Valley, Inc. have parent companies, affiliated companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED:

I. SINCE AUTO CLUB HAS NO ERISA CAUSE OF ACTION AGAINST FREDERICK TO BEGIN WITH THERE IS NO NEED TO CONSIDER THE PARAMETERS OF FEDERAL COMMON LAW UNDER ERISA. 5

II. EQUITABLE SUBROGATION CLAIMS ARE NOT PROVIDED UNDER ERISA NOR WOULD THEY BE WITHIN THE JURISDICTION OF STATE COURTS. 7

III. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF FEDERAL COMMON LAW TO COVERAGE DISPUTES BETWEEN ERISA PLANS AND INSURANCE COVERAGES GOVERNED BY STATE LAW. 10

IV. THE REMEDY WHICH AUTO CLUB SEEKS TO OBTAIN UNDER FEDERAL COMMON LAW WOULD SUBVERT, RATHER THAN FURTHER, THE POLICIES UNDERLYING ERISA. 11

CONCLUSION 14

APPENDIX A-1

TABLE OF AUTHORITIES

PAGE

CASES:

Allstate Insurance Co. v. *The Sixty-Five Security Plan*, 879 F.2d 90 (3rd Cir. 1989) 9

Auto Club v. *New York Life Insurance Co.*, 440 Mich. 126; 485 N.W.2d 695 (1992) 3, 8

Auto Owners Insurance Co. v. *Thorn Apple Valley, Inc.*, 818 F.Supp. 1078 (W.D. Mich., 1993), *appeal docketed*, No. 93-1606 (6th Cir. May 5, 1993) 6

Blue Cross/Blue Shield of Connecticut v. *Inter Valley Health Plan*, 62 U.S.L.W. 3469 (Jan. 18, 1994) 11

Cummings by Techmeier v. *Briggs and Stratton Retirement Plan*, 797 F.2d 383 (7th Cir. 1986) 13

Federal Kemper Insurance Co. v. *Health Ins. Administration, Inc.*, 424 Mich. 537; 383 N.W.2d 590 (1986) 4, 12

Federal Kemper Insurance Co. v. *The Western Insurance Cos.*, 97 Mich. App 204; 293 N.W.2d 765 (1980) 8

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 6

FMC Corp. v. *Holliday*, 498 U.S. 52 (1990); 498 U.S. 996 (1990) 8, 10

Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987) 12

Foster-McGaw Hospital v. *Welfare Fund*, 925 F.2d 1023 (7th Cir. 1991), cert. denied, 502 U.S. ___; 112 S.Ct. 74 (1991) 7

French v. *Grand Beach Co.*, 239 Mich. 575; 215 N.W. 13 (1927) 8

PAGE

Health Choice v. *Automotive Employee Benefit Trust*, 988 F.2d 53 (8th Cir. 1993) 13

Herman Hospital v. *MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) 9

Inter-Valley Health Plan v. *Blue Cross/Blue Shield of Connecticut*, 16 Cal. App. 4th 60; 19 Cal. Rptr. 2d 782 (1993), cert. denied, 62 U.S.L.W. 3469 (Jan. 18, 1994) 10

Machine Parts Corp. v. *Schneider*, 289 Mich. 567; 286 N.W. 831 (1939) 8

Massachusetts Mutual Life Insurance Co. v. *Russell*, 473 U.S. 134 (1985) 6

McGann v. *H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991), cert. denied, 506 U.S. pppp, 113 S.Ct. 482 (1992) 12

Mertens v. *Hewitt Associates, Inc.*, 508 U.S. ___; 113 S.Ct. 2063 (1993) 5

Michigan v. *Long*, 463 U.S. 1032 (1983) 11

Misic v. *Building Services Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986) 9

Moore v. *Reynolds Metals Co. Retirement Plan*, 740 F.2d 454 (6th Cir. 1984) 12, 13

Musto v. *American General Corp.*, 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989) 12

Northwest Airlines v. *Transport Workers*, 451 U.S. 77 (1981) 6

Pilot Life Insurance Co. v. *Dedeaux*, 481 U.S. 41 (1987) 6

PAGE

P.M. Group Life Insurance Association v. *Western Growers Assurance Trust*, 953 F.2d 543 (9th Cir. 1992) 10

Thomason v. *Aetna Life Insurance Co.*, 9 F.3d 645 (7th Cir. 1993) 13

Thorn Apple Valley, Inc. v. *Auto Club Insurance Association*, 489 U.S. 996 (1990) 3

UIU Severance Pay Trust Fund v. *Local 18-U*, 998 F.2d 509 (7th Cir. 1993) 13

Winstead v. *J.C. Penney Co.*, 933 F.2d 576 (7th Cir. 1991) 10

STATUTES:

Sections 502 and 514 of the Employee Retirement Income Security Act of 1974, as amended 29 U.S.C. §§ 1132 and 1144 ..... *passim*

Section 3109a of Michigan's no-fault auto insurance law, MICH. COMP. LAWS § 500.3109a 1, 3, 4

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AUTO CLUB INSURANCE ASSOCIATION,
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FREDERICK & HERRUD, INC.,
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BRIEF IN OPPOSITION
ON BEHALF OF FREDERICK & HERRUD, INC.
(now known as Thorn Apple Valley, Inc.)

Respondent Frederick & Herrud, Inc. (Frederick), respectfully requests the Court to deny the petition for certiorari, which seeks review of the Michigan Supreme Court's decision reported at 443 Mich. 358; 505 N.W.2d 820 (1993).

STATUTORY PROVISIONS

The decision of the Michigan Supreme Court below was based on that court's construction of Section 3109a of Michigan's no-fault automobile insurance law. MICH. COMP. LAWS § 500.3109a.

In addition, resolution of the federal issues raised in the petition and below, assuming the Court chooses to consider them, entails interpretation of Sections 502 and 514 of the Employee Retirement Income Security Act

of 1974, as amended. 29 U.S.C. §§ 1132 and 1144. Section 3109a of Michigan's no-fault insurance law and Section 502 of ERISA were omitted from the Appendix to the Petition. They are reprinted here in A-1–A-10.

STATEMENT OF THE CASE[1]

In 1982, Petitioner Auto Club commenced this action in Michigan state court. It invoked state law in an effort to compel Respondent Frederick[2] to reimburse it for auto insurance benefits paid to seven Frederick employees who were also beneficiaries of the company's self-insured welfare benefit plan. These seven insureds had been injured in auto accidents in 1980 and 1981. Auto Club paid no-fault benefits to them under auto insurance policies issued under Michigan's no-fault auto insurance law. Auto Club claimed that Frederick was required to reimburse it for all of the insurance benefits it paid despite a provision in Frederick's plan which states that "in all cases [involving] employees with no-fault auto insurance coverage, the auto insurance carrier will be primary."

Auto Club initially based its claim against Frederick entirely on Michigan law. The precise theory of law proved elusive as the litigation proceeded. The initial complaint mentioned only general notions of contract law. Several years later, before the Michigan Court of Appeals, Auto Club successfully argued that it could recover from Frederick because of policies emanating

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1 We are generally satisfied with the summary of facts set forth in the opinion of the Michigan Supreme Court below. This additional summary is provided only to clarify the posture of this litigation.

2 Frederick, or Thorn Apple Valley, Inc., as it is now known, is a Michigan-based meat packing company.

from Section 3109a of Michigan's no-fault auto insurance law. 145 Mich. App. 722; 377 N.W.2d 902 (1985). That provision requires that auto insurers in Michigan offer insureds the option of buying cheaper no-fault insurance coverage with "deductibles and exclusions reasonably related to other health and accident coverage on the insured." MICH. COMP. LAWS § 500.3109a. As late as 1992, however, Auto Club successfully asserted in state court litigation unrelated to this case that its right to recover no-fault benefit payments from its insureds' employer-provided health plans was contractual in nature after all — in order to benefit from Michigan's relatively long contract statute of limitations. *See Auto Club* v. *New York Life Insurance Co.*, 440 Mich. 126; 485 N.W.2d 695 (1992).

In either case, all state law formulations of Auto Club's claim against Frederick obviously "relate to" Frederick's self-insured employee benefit plan and, hence, were preempted by ERISA. This conclusion was ultimately sustained by this Court in this case in 1990, 489 US 996 (1990), and, on remand, by the Michigan Court of Appeals in 1991, 191 Mich App 471; 479 N.W.2d 18 (1991).

After the Michigan Court of Appeals confirmed that Auto Club's state law claims against Frederick were preempted, Auto Club then shifted course and argued that it could still recover from Frederick — but now directly under ERISA itself. But, since ERISA does not provide a remedy for disputes over coverage between ERISA plans and coverages governed by state law, Auto Club urged that a state law doctrine of prorated liability should be imported into ERISA jurisprudence and applied in this dispute — as a matter of federal common law.

In the decision which Auto Club now urges this Court to review the Michigan Supreme Court rejected Auto

Club's effort to resuscitate its suit against Frederick by relabeling it a federal common law claim. Citing Michigan public policy favoring employer sponsorship of employee benefit plans, and federal cases holding that ERISA coverage disputes should generally be resolved in accordance with the terms of the pertinent ERISA plan, the court decided that the provision in Frederick's plan which states that auto insurance must provide primary coverage for auto accidents involving plan beneficiaries "must be given its clear meaning without the creation of any artificial conflict [with Auto Club's no-fault policy] based upon [MICH. COMP. LAWS § 500.3109a]." 443 Mich at 387; 505 N.W.2d at 833. Noting that "there is a considerable state interest in facilitating the creation and voluntary funding of [welfare plans by employers]," the court concluded that MICH. COMP. LAWS § 500.3109a "does not reach an ERISA plan with a [coordination of benefits] clause where that clause is unambiguous." 443 Mich at 387-88; 505 N.W.2d at 833. In reaching this conclusion, the court overruled an earlier decision in *Federal Kemper Insurance Co* v. *Health Ins. Administration, Inc.*, 424 Mich. 537; 383 N.W.2d 590 (1986), in which that court had held that auto carriers could sue health benefit plans for reimbursement on the theory that this furthered the underlying policies of Michigan's no-fault auto insurance law. 443 Mich. at 390; 505 N.W.2d at 834.

Auto Club now urges this Court to decide that federal law must be construed to afford it a remedy against Frederick in this case.

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REASONS WHY THE PETITION SHOULD BE DENIED

I.

SINCE AUTO CLUB HAS NO ERISA CAUSE OF ACTION AGAINST FREDERICK TO BEGIN WITH THERE IS NO NEED TO CONSIDER THE PARAMETERS OF FEDERAL COMMON LAW UNDER ERISA.

The parties here have not chosen a "narrow battlefield," leaving only the abstract issue formulated by Auto Club for consideration. In fact, we have long disputed that a cause of action under ERISA even exists between Auto Club and Frederick, much less one which would necessitate the examination of the federal common law issues determined by the court below. *See generally Mertens* v. *Hewitt Associates, Inc.*, 508 U.S. ___; 113 S.Ct. 2063, 2067 (1993). We continue to contend that in order to reach the federal common law issues decided by the court below (or those raised in the petition), a court must consider whether ERISA permits Auto Club to sue Frederick in the circumstances of this case — at all. Since maintenance of such a cause of action by Auto Club cannot be squared with the language of ERISA or with previous decisions of this Court, review of the question of how federal law might resolve the putative conflict between Auto Club's insurance policies and Frederick's ERISA plan is hypothetical, at best.

This past Term this Court reaffirmed that claims and remedies under ERISA are limited to those specifically set forth in the statute's "comprehensive and reticulated" civil enforcement provision. *See Mertens* v. *Hewitt Associates, Inc.*, 508 U.S. ___; 113 S.Ct. 2063 (1993). In the face of this "carefully crafted and detailed enforcement scheme," the Court stated that it is "unwilling to infer causes of action in the ERISA context." 113 S.Ct. at 2067; *see also Massachusetts Mutual Life Insurance Co.* v.

Russell, 473 U.S. 134, 146-47 (1985); *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987).[3]

Vague notions of "federal common law" provide no detour around ERISA's civil enforcement scheme. True enough, the legislative history underlying ERISA indicates that Congress intended that a "body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (remarks of Senator Javitz), *quoted in Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. at 56; *see also Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). But, "the authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Associates, Inc.*, 508 U.S. at ___; 113 S.Ct. at 2070.

To allow Auto Club to maintain its claim against Frederick under federal common law would require this Court to do just that: impermissibly revise the text of the statute. ERISA does not explicitly provide a remedy for Auto Club against Frederick in this case.[4] Auto Club, and other auto insurers, are plainly not among the "persons empowered to bring a civil action" under ERISA. Nor is an action by an auto insurance company seeking

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3 The unwillingness of this Court to legislate new causes of action under statutes containing comprehensive enforcement and remedial provisions is not limited to ERISA litigation. *See also Northwest Airlines* v. *Transport Workers*, 451 U.S. 77, 97 (1981) ("the judiciary may not in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs").

4 The one district court that has attempted to fashion a federal common law remedy against an ERISA plan and in favor of a Michigan no-fault auto insurer candidly conceded that "the ERISA statute itself does not provide an answer." *Auto Owners Insurance Co.* v. *Thorn Apple Valley, Inc.*, 818 F.Supp. 1078, 1081 (W.D. Mich., 1993), *appeal docketed*, No. 93-1606 (6th Cir. May 5, 1993). That should have been enough to end that litigation, a contention we are currently urging to the Sixth Circuit.

to recover no-fault insurance benefit payments from an ERISA plan among those actions comprehended by the six civil actions enumerated in Section 502. While Congress could have, it did not provide for "litigation when a plan subject to ERISA interlocks with coverage governed by state law." See *Foster-McGaw Hospital* v. *Welfare Fund*, 925 F.2d 1023, 1025 (7th Cir. 1991), cert. denied, 502 U.S. ___; 112 S.Ct. 74 (1991). Courts should not be in the business of revising acts of Congress where a litigant believes the legislation does not go far enough.

No good reason exists in this case for usurping the power of Congress, and discarding the statute and previous decisions of this Court construing it, in order to infer a new cause of action for Michigan automobile insurance carriers which Congress could have provided, but did not see fit to enact. Without a cause of action against Frederick, the question Auto Club has formulated for review is meaningless.

II.

EQUITABLE SUBROGATION CLAIMS ARE NOT PROVIDED UNDER ERISA NOR WOULD THEY BE WITHIN THE JURISDICTION OF STATE COURTS.

Review of the abstractions presented in the petition would arguably also require this Court to consider the existence of a federal subrogation remedy under ERISA, an equitable remedy which is nowhere mentioned in the statute and which no federal circuit has recognized. In the decision below, the Michigan Supreme Court sidestepped the absence of a statutory remedy in ERISA for Auto Club's dispute with Frederick and concluded that Auto Club could sue Frederick as the "subrogee of its insureds' right to seek payment from their ERISA plans." 443 Mich. at 370-72; 505 N.W.2d at 825-826. Subrogated to the plan rights of its insureds, Auto Club could then presumably "step into their shoes" and sue Frederick for benefits under Section 502(a)(1)(B) of ERISA. There

are at least three reasons why subrogation is unavailable to Auto Club in this case:

1. Subrogation is a creature of state law. *See, e.g., Auto Club* v. *New York Life Insurance Co.*, 440 Mich. 126, 132-33; 485 N.W.2d 695, 698 (1992). There is no generally recognized federal subrogation remedy. But, if applied to self-insured ERISA plans, state subrogation doctrines are preempted by ERISA. *See FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990). Accordingly, subrogation must either be available to Auto Club directly under ERISA, or not at all.

2. But, even if subrogation can be obtained directly under ERISA, it is nonetheless unavailable in state court. Subrogation is an equitable remedy. *See, e.g., French* v. *Grand Beach Co.*, 239 Mich. 575, 580, 215 N.W. 13 (1927) ("the doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect"); *Machine Parts Corp.* v. *Schneider*, 289 Mich. 567, 574-76, 286 N.W. 831, 834-835 (1939); *Auto Club* v. *New York Life Insurance Co.*, 440 Mich. 126, 132-33 485 N.W.2d 695, 698 (1992); *Federal Kemper Insurance Co.* v. *The Western Insurance Cos.*, 97 Mich. App 204, 208; 293 N.W.2d 765, 767 (1980) ("the proper action here is one in equity for subrogation"). And, while equitable relief may be obtained in an action arising under Section 502(a)(3) of ERISA, actions arising under that provision fall within the exclusive jurisdiction of the federal courts. *See* 29 U.S.C. § 1132(e)(1). Thus, if subrogation is available in suits against ERISA plans, then the Michigan state courts nonetheless had no subject matter jurisdiction to consider or apply it here.

3. There is no federal right of subrogation under ERISA in any event. Section 502 of ERISA makes no mention of it. The Michigan Supreme Court in its opinion below ignored the statute and stated that there is a split of authority among the courts regarding whether a subrogation claim can be brought against an ERISA plan by a party which is not expressly empowered to sue under ERISA. 443 Mich. at 370-72; 505 N.W.2d 825-826. In fact, there is no such split of authority.

Concededly, several courts have held that persons or entities may sue, as if they were beneficiaries under ERISA plans, based upon express assignments of plan rights by persons who are themselves plan participants. *E.g.*, *Misic* v. *Building Services Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986); *Herman Hospital* v. *MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988). But, since a "beneficiary" is defined in ERISA as a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder," 29 U.S.C. § 1002(7), allowing an assignee — i.e., a person or entity expressly "designated" by a plan participant as entitled to benefits under a plan — to sue as a beneficiary appears faithful to the statutory text. Subrogation, however, occurs by operation of law and is not dependent upon any formal designation by a plan participant. Not surprisingly, no federal circuit so far as we are aware has ever ruled that claims may be brought under ERISA and against ERISA plans by entities claiming to assert plan rights derivatively by way of subrogation. At least one circuit, the Third, has ruled to the contrary. *Allstate Insurance Co.* v. *The Sixty-Five Security Plan*, 879 F.2d 90, 94 (3rd Cir. 1989).

In our 1989 petition for certiorari in this case, we expressly raised the question of whether ERISA pre-

empts Auto Club's subrogation claims. The Court's order granting certiorari and remanding for proceedings consistent with *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990), 498 U.S. 996 (1990), arguably sustained our position on preemption. It did not invite the Michigan courts to concoct a new federal remedy of subrogation, equitable relief which they would be powerless to provide under Section 502.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF FEDERAL COMMON LAW TO COVERAGE DISPUTES BETWEEN ERISA PLANS AND INSURANCE COVERAGES GOVERNED BY STATE LAW.

Citing decisions in which several courts have developed federal common law remedies for priority of coverage disputes *between* ERISA plans, Auto Club asserts that there are conflicting decisions concerning the federal common law issue presented in its petition. This is simply not true.

One ERISA plan can arguably sue another ERISA plan to determine priority of coverage under Section 502(a)(3)(B) of ERISA,[5] which authorizes suits by a plan fiduciary to "enforce" the terms of a plan. *See Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 578-79 (7th Cir. 1991). It is in the context of suits *between* ERISA plans that there are conflicting decisions concerning how such priority disputes should be determined. *Compare P.M. Group Life Insurance Association* v. *Western Growers Assurance Trust*, 953 F.2d 543 (9th Cir. 1992) (applying "birthday rule"), *with Inter-Valley Health Plan* v. *Blue Cross/Blue Shield of Connecticut*, 16 Cal. App. 4th 60; 19 Cal. Rptr. 2d

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5 State courts, however, would have no subject matter jurisdiction over such a claim. *See* 29 U.S.C. § 1132(e)(1).

782 (1993), cert. denied, 62 U.S.L.W. 3469 (Jan. 18, 1994) (divorce judgment applied instead of "birthday rule"). Petitioner actually cites nothing *but* decisions involving disputes *between* health benefit plans in support of its assertion that this Court should decide whether and how federal common law would resolve a dispute between an ERISA plan and a non-ERISA entity such as an auto insurance company.

This Court recently decided that the proper application of federal common law to resolve disputes *between* ERISA plans did not warrant review. *Blue Cross/Blue Shield of Connecticut v. Inter Valley Health Plan*, 62 U.S.L.W. 3469 (Jan. 18, 1994). There is surely no reason to consider the even more obscure (and largely parochial) question presented in the petition, which was raised in a context in which the very existence of a federal cause of action is doubtful and in which it is more doubtful that the Michigan state courts below even had subject matter jurisdiction.

IV.

THE REMEDY WHICH AUTO CLUB SEEKS TO OBTAIN UNDER FEDERAL COMMON LAW WOULD SUBVERT, RATHER THAN FURTHER, THE POLICIES UNDERLYING ERISA.

The rule which Auto Club urges this Court to adopt as a matter of federal common law[6] would turn ERISA

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6 Although there is no "plain statement" predicating the ruling below on an independent and adequate state ground, *See Michigan* v. *Long*, 463 U.S. 1032 (1983), the finding that the provisions of Frederick's plan should prevail over Auto Club's no-fault policies nonetheless rests largely on the Michigan Supreme Court's construction of state law and considerations of state public policy. The court's reasoning is expressly predicated on a decision not to create an "artificial conflict" between the Frederick plan and Auto Club's no-fault policies "based upon" Section 3109a of Michigan's no-fault

(concluded on page 12)

and its underlying policies upside down. After resolving — we contend erroneously — the question of whether Auto Club has a cause of action against Frederick over which state courts could assert jurisdiction, the Michigan Supreme Court concluded below that in cases of conflict between the provisions in an ERISA employee benefit plan and a no-fault automobile insurance policy, the ERISA plan's provisions should prevail. The court reasoned that the federal policy underlying ERISA encourages rather than discourages the adoption of employee benefit plans and that allowing Auto Club to pursue a claim for reimbursement against Frederick despite what Frederick's ERISA plan clearly provides would tend to discourage Frederick and other employers from providing employee benefit plans for their employees. This is a consideration frequently cited by federal courts in resolving ERISA disputes. *See, e.g., Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987); *McGann* v. *H&H Music Co.*, 946 F.2d 401, 407 (5th Cir. 1991), cert. denied, 506 U.S. ___, 113 S.Ct. 482 (1992); *Musto* v. *American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989); *Moore* v. *Reynolds Metals Co. Retirement Plan*, 740 F.2d 454, 456-57 (6th Cir. 1984). This reasoning is sound and requires no adjustment by this Court.

Moreover, in those situations where federal courts have proceeded to develop federal common law in resolving claims under ERISA, courts have repeatedly cautioned that they will only do so to "effectuate the

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(*continued from page 11*)

auto insurance law. 443 Mich. at 387; 505 N.W.2d 833. The court also observed that the "federal policy furthers the state interest of fostering the existence of health and welfare benefit plans for its citizens," *id.*, and concluded by overruling an earlier decision, *Federal Kemper Insurance Co.* v *Health Insurance Administration, Inc.*, 424 Mich. 537, 383 N.W.2d 590 (1986), which was based entirely on state law. 443 Mich. at 390; 505 N.W.2d at 834.

policies underlying ERISA," *see Thomason* v. *Aetna Life Insurance Co.*, 9 F.3d 645, 647 (7th Cir. 1993), or "the statutory pattern enacted by Congress" in ERISA, *UIU Severance Pay Trust Fund* v. *Local 18-U*, 998 F.2d 509, 512 n.10 (7th Cir. 1993). Clearly, the power to develop federal common law under ERISA, according to decisions in several circuits (including the Sixth), does not translate into a license to override or rewrite the plain terms of an ERISA plan. *Cummings by Techmeier* v. *Briggs and Stratton Retirement Plan*, 797 F.2d 383, 390-91 (7th Cir. 1986) ("we are particularly reluctant to fashion a federal common law doctrine of unjust enrichment where such a right would override a contractual provision in a pension plan"); *Moore* v. *Reynolds Metals Co. Retirement Plan*, 740 F.2d 454, 456, 57 (6th Cir. 1984) ("the district court modified impermissibly the plain language of the pension plan").

How adoption of Auto Club's position that federal common law requires that the provision in Frederick's plan making it secondary to auto insurance be voided would further or effectuate ERISA or its underlying policies is beyond us. Frederick's plan expressly provides that its coverage is secondary to automobile insurance coverage whenever a plan participant or beneficiary is involved in an auto accident and has no-fault insurance coverage. The plan language is not susceptible to any rational interpretation compatible with its terms or ERISA which would cause Frederick to pay all or even some of the medical expenses of Auto Club's seven insureds. After more than 10 years of litigation, Auto Club has failed to articulate a single federal policy that would support its request that this Court supplement ERISA with a new federal common law remedy, which would rewrite ERISA plans in Michigan and benefit no one except Auto Club and other Michigan no-fault insurers. *See generally Health Choice* v. *Automotive Employee Benefit Trust*, 988 F.2d 53 (8th Cir. 1993).

The contortions of the statutory text and its underlying policies which Auto Club urges in support of its claim do not merit this Court's consideration in this case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 9, 1994

APPENDIX

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STATUTES INVOLVED[7]

SECTION 3190a OF MICHIGAN'S NO-FAULT AUTO INSURANCE LAW; MICH. COMP. LAWS §500.3109a

Sec. 3109a. An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

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[7] **Petitioner has included in its appendix only Section 514 of ERISA. 29 U.S.C. § 1144.**

SECTION 502
OF THE EMPLOYEE RETIREMENT
INCOME SECURITY ACT OF 1974,
AS AMENDED,
29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin

any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if —

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the require-

ments of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil

actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs, awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater or —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 2975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for

the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of —

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) —

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (1)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that —

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.